

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CITIZENS FOR SENSIBLE
DEVELOPMENT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY and JAMES & TERRY
LEHMAN,

Respondents.

PCHB No. 90-134

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding.

This matter is the appeal of a permit to appropriate public groundwater issued by Department of Ecology to James and Terry Lehman.

Appearances were as follows:

1. Appellant, Citizens for Sensible Development, by Michael L. Abbott, Board Member.

2. Respondent, Department of Ecology, by P. Thomas McDonald, Assistant Attorney General.

3. Respondent, James and Terry Lehman, by Edward E. Level, Attorney at Law.

The hearing was conducted in Seattle, Washington on January 8, 1991.

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FINAL FINDINGS OF FACT,
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1 Gene Barker and Associates provided court reporting services.
2 Witnesses were sworn and testified. Exhibits were examined.
3 From testimony heard and exhibits examined, the Pollution Control
4 Hearings Board makes these

5 FINDINGS OF FACT .

6 I

7 This matter arises on Whidbey Island about midway between Langley
8 and Useless Bay. It concerns the application made by James and Terry
9 Lehman to the State Department of Ecology for permission to withdraw
10 public groundwater. The application seeks withdrawal at a maximum
11 rate of 52 gallons per minute, limited to 50 acre-feet per year, for
12 community domestic supply and commercial/light industry. The property
13 on which the water is to be used is an irregular shaped area with the
14 well site at its approximate center. The area is approximately equal
15 to one square mile.

16 II

17 James Lehman is a well driller. He is successor in interest to
18 an existing groundwater right and existing well, both obtained from
19 Donna J. Schiltz. The existing well was developed by Ms. Schiltz in
20 1979 for domestic service to one residence. The purpose of the
21 Lehmans' application is to obtain more water from that well and to use
22 it for community water service.

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III

Ecology received protests of the application from Mr. and Mrs. William Beck and Sue Ellen White-Hansen. The protesters' wells are located more than 1/2 mile from the well in question.

IV

Ecology received letters supporting the application from the State Department of Social and Health Services and the Island County Health Department. Both health agencies noted consistency with the Water System Coordination Act. The State DSHS letter noted low risk of salt water intrusion.

V

In processing this application Ecology reviewed available technical literature, searched water right files, prepared a computer model for operation of the proposed withdrawal, and pump tested the well in question.

VI

Ecology made no threshold determination under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Ecology's position is that this application is exempt from SEPA procedures under WAC 197-11-800(4). That subsection lists as a categorical exemption:

(4) Water Rights. The following appropriations of water shall be exempt, the exemption covering not only the permit to appropriate water, but also any hydraulics permit, shoreline permit or building permit required for a normal diversion or intake structure, well and pump-house reasonably necessary to accomplish the exempted appropriation, and including any

1 activities relating to construction of a distribution
2 system solely for any exempted appropriation:

3 (a) Appropriations of fifty cubic feet per second
4 or less of surface water for irrigation purposes, when
5 done without a government subsidy.

6 (b) Appropriations of one cubic foot per second or
7 less of surface water, or of 2,250 gallons per minute
8 or less of ground water, for any purpose. (Emphasis
9 added.)

10 VII

11 On June 15, 1990, Ecology granted the Lehmans' application by
12 issuance of a groundwater withdrawal permit. Appellant, Citizens' for
13 Sensible Development, appealed that permit to this Board on July 16,
14 1990.

15 VIII

16 Ecology's approval and permit contain these conditions:

17 1) A certificate of water right will not be issued
18 until a final investigation is made.

19 2) The amount of water granted is a maximum limit that
20 shall not be exceeded and the water user shall be
21 entitled only to that amount of water within the
22 specified limit that is beneficially used and required.

23 3) Permittee or its successor(s) shall submit in
24 writing to the Department of Ecology, Northwest
25 Regional Office, Redmond, Washington, during the months
26 of April and August each year, the chloride
27 concentration of the water pumped and static water
level (pump off) of the well authorized by this
permit. Depending on the results of this data
collection, the withdrawal of ground water under this
permit may be limited, or other appropriate action may
be required, by Department of Ecology order, to prevent
seawater intrusion into the subject qualifier.

4) An approved measuring device shall be installed and
maintained in accordance with RCW 90.03.360,

1 WAC 508-64-020 through WAC 508-64-040. Meter readings
2 shall be recorded monthly and this data shall be
3 maintained and made available to the Department of
Ecology upon request.

4 IX

5 The well in question is 372 feet deep. It is cased to 363 feet,
6 with a screen set between 363 and 372 feet. Water is withdrawn
7 through the screened interval.

8 X

9 The static water level in the well is at 282 feet below ground.

10 XI

11 The Lehmans originally sought withdrawal at 90 gallons per
12 minute. Ecology pump tests on the well established a pumping water
13 level of 354 feet below ground at that rate of withdrawal. This came
14 too close to the 363 foot level where screening and water intake
15 begins. The Lehmans then amended their application to 52 gallons per
16 minute which is the amount in the permit at issue.

17 XII

18 Ecology pump tested the well at 52 gallons per minute. At this
19 reduced rate of withdrawal, the pumping water level is 297 feet below
20 ground. That level was reached after 1/2 hour of pumping and remained
21 for the ensuing 17 1/2 hours of the pump test. The water returned to
22 static level within 1/2 hour after pumping ceased.

23 We find that water is available at the site and that the aquifer

1 utilized can yield water within a reasonable pumping lift. It was not
2 shown that water is not available in quantities approved by Ecology.

3 XIII

4 The withdrawal in question would not affect water levels in wells
5 more than 1/2 mile away. There would be a maximum lowering of only 2
6 feet in the water level of wells within 1/4 mile. There are no wells
7 within 1/2 mile of the well in question.

8 XIV

9 The withdrawal at issue taps a water bearing zone that dips
10 below: a) the well of an unknown owner located a little over 1/2 mile
11 away and b) the well at Lake View Terrace, a subdivision, located yet
12 farther away.

13 We find that the proposed withdrawal of groundwater is unlikely
14 to affect adversely any water rights in existing wells.

15 XV

16 A single water service uses between .32 and .50 acre feet
17 annually. Thus, the maximum of 50 acre feet per year provided in the
18 permit would serve from 99 to 155 users. Ecology set the maximum
19 services in the permit at 155. The State DSHS has specified 99
20 services for the proposed community water system.

21 XVI

22 The Lehmans intend to serve several existing water users
23 including the Whidbey Airpark which is in need of fire flow for 8
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1 existing, light commercial buildings. They would also serve existing
2 homes in and near the community of Bayview. About half of the
3 proposed water withdrawal would go to existing users.

4 XVII

5 The other half of the proposed water withdrawal would go to
6 future development. The nature and location of this development is
7 uncertain. There has been no identification, on this record, of
8 specific development which the water right would serve beyond existing
9 uses. The impacts of that development as well as the development
10 itself remains speculative at this time.

11 We find that the groundwater appropriation approval was made
12 before the environmental effects of any development beyond the
13 appropriation itself could be meaningfully evaluated.

14 XVIII

15 It was not proven that the appropriation is a segment of a
16 proposal involving related actions, some exempt and some not, or all
17 exempt but together having a probable significant adverse
18 environmental effect.

19 Moreover, we are persuaded that the approval of the appropriation
20 under the circumstances was not action which limited the range of
21 reasonable alternatives for land use in the area.

22 XIX

23 A water sample from the subject well was tested for salt content
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1 by Ecology in the process of investigating for seawater intrusion.
2 The sample contained only 11 milligrams per liter of chlorides. This
3 is a background level well below that associated with seawater
4 intrusion.

5 XX

6 The mean sea level is approximately 300 feet below ground at the
7 well site. The pumping level, 297 feet below ground (see Finding of
8 Fact XII, above), is therefore above sea level. This counters the
9 concern introduced by the appellant for pumping levels below sea level
10 (see Exhibit A-4).

11 In the future, should a coastal well be approved with its pumping
12 level below sea level, we would require that Ecology go forward with
13 evidence that it has studied the aquifer or basin and that the
14 cumulative effect of such a proposed well together with existing wells
15 will leave a clear margin of safety against sea water intrusion within
16 the basin.

17 In this case, we are not persuaded that any data developed to
18 date demonstrates a likelihood that this withdrawal, as approved, will
19 induce seawater intrusion.

20 XXI

21 Any Conclusion of Law deemed to be a Finding of Fact is hereby
22 adopted as such. From these Findings of Fact, the Board makes these
23

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.

4 II

5 We conclude that the action of Ecology, approving this
6 groundwater appropriation with conditions, was categorically exempt
7 from the threshold determination and EIS requirements of SEPA, by
8 virtue of the water rights exemption of WAC 197-11-800(4), quoted
9 above.

10 Categorical exemptions are subject to limitations contained in
11 WAC 197-11-305. Under the facts, however, we conclude that those
12 limitations do not apply in this case to remove the exemption.

13 III

14 We note particularly that, before an action can fit within the
15 limitations on exemptions, the series of actions to which it is
16 related must be sufficiently in focus to constitute a "proposal."
17 WAC 197-11-305.

18 By virtue of WAC 197-11-055 a threshold determination and
19 environmental impact statement, if required, are to be prepared at the
20 point "when the principal features of a proposal and its environmental
21 impacts can be reasonably identified."

22 The definition of "proposal" in WAC 197-11-784 states:

23 *A proposal exists at that stage in the development of*
24 *an action when an agency is presented with an*

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1 application or has a goal and is actively preparing to
2 make a decision on one or more alternative means of
3 accomplishing the goal and the environmental effects
can be meaningfully evaluated.

4 In the instant case, beyond the appropriation itself, there was
5 no "proposal" when Ecology ruled.

6 IV

7 Under WAC 197-11-305, the exempt aspects of proposals may proceed
8 prior to environmental review if there is no adverse environmental
9 effect or limitation on the choice of reasonable alternatives. See
10 WAC 197-11-070. We conclude that such is the case here.

11 When, however, development proposals come into being for uses
12 which would absorb the half of this appropriation not devoted to
13 existing development, those proposals should receive scrutiny under
14 SEPA. It is probable that the County is the appropriate government to
15 provide that scrutiny.

16 V

17 The issuance of the groundwater permit at issue has not been
18 shown to be inconsistent with SEPA. See Bucklin Hill Neighborhood
19 Association v. Department of Ecology and Island Utility Company, PCHB
20 No. 88-177 (1989).

21 VI

22 We conclude that the action of Ecology, approving the groundwater
23 appropriations with conditions, meets the requirements of the
24 applicable water codes, specifically, RCW 90.03.290 as made applicable
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1 to groundwater applications by RCW 90.44.060. As stated in Stemple v.
2 Department of Water Resources, 82 Wn.2d 109, 115, 508 P.2d 166 (1973):

3 The statute requires the department to make
4 essentially four determinations prior to issuance of a
5 water use permit: 1) what water, if any, is available;
6 2) to what beneficial uses the water is to be applied;
7 3) will the appropriation impair existing rights; and
8 4) will the appropriation detrimentally affect the
9 public welfare.

10 VII

11 Availability of Water. Water is available in the quantity
12 approved. The water availability criterion is given additional
13 content in the groundwater context by RCW 90.44.070 which prohibits
14 the granting of a permit for "withdrawal of public groundwaters beyond
15 the capacity of the underground bed or formation . . . to yield such
16 water within a reasonable or feasible pumping lift. . . ."

17 The drawdown characteristics of the well tested do not present a
18 likelihood that this standard will be exceeded by the mining of water
19 (i.e., removal without recharge).

20 VIII

21 Beneficial Use. The proposed use for the groundwater is
22 domestic, commercial and light industry. These are all beneficial
23 uses. RCW 90.54.020(1).

24 The requirement for a beneficial use is consistent with the facts
25 of this case which involve indefinite future development that would be
26 served by this appropriation. A water appropriation permit approves
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1 withdrawal of water for an approved purpose. The water code requires
2 that the project be diligently pursued and a time schedule will be set
3 in the permit. RCW 90.03.320. But there is no requirement that the
4 project be engineered, layed out or planned before permission to
5 appropriate is granted. Bucklin Hill, above.

6 Should the Lehmans fail to appropriate water in the amount
7 permitted, their perfected appropriation will be for a lesser amount.
8 However, these possibilities do not take the initially permitted use
9 objectives (domestic, commercial, or light industrial) out of the
10 definition of beneficial. Bucklin Hill, above.

11 XIX

12 Impairment. The approved appropriation will not impair
13 existing rights.

14 XX

15 Public Welfare. Seawater intrusion, were it to occur, would
16 violate the public welfare standard. Our findings do not support the
17 likelihood of this occurrence. But, again the monitoring conditions
18 of the permit (Findings of Fact VIII, No. 3, above), provide a
19 mechanism for detection and correction. It has not been shown that
20 this appropriation would detrimentally affect the public welfare.

21 XXI

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby
23 adopted as such.

24 From these Conclusions of Law, the Board enters the following
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1 ORDER

2 The groundwater appropriation permit granted by the Department of
3 Ecology to James and Terry Lehman is, hereby, affirmed.

4 DONE at Lacey, WA, this 22nd day of May, 1991.

6 POLLUTION CONTROL HEARINGS BOARD

7 Harold S. Zimmerman
8 HAROLD S. ZIMMERMAN, Member

9 Annette S. McGee
10 ANNETTE S. MCGEE, Member

11 William A. Harrison
12 WILLIAM A. HARRISON
13 Administrative Appeals Judge